



REPORT OF THE ADJUDICATOR

WASPA Member (SP): Sybase 365

Information Provider (IP): Blinck
(if applicable)

Service Type: Subscription

Complainant: Competitor

Complaint Number: 4335 & 4336

Code version: Code v5.7 and Ad Rules v1.6

Date of Report: 14/7/2008

Complaint

1. The Complainant, an employee of a WASPA member, who wishes to remain anonymous, lodged two complaints via the WASPA website on 21 May 2008. The first, designated 4335, reads as follows:

Affiliations: I am employed by, or otherwise associated with one of WASPA's member companies

Affiliation_Information: I want to remain anonymous. I am a WASPA member

Name_WASP: Sybase365

OtherID: Celdorado

Code_Breached: Code_Breached: 11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

What this means:

An advert must not appear to offer the customer a single ring-tone, image or other piece of content for free or for a fee, if it is actually an advert for a subscription service.

Detailed_Description_Complaint: A subscription service is being bundled with a specific content item, a realtone, on this website.

The customer is prompted to select a specific content item to start the subscription. The code clearly states that this is bundling and therefore not allowed.

<http://za.celldorado.com/ZA/ADS/2060508842/index.php?trackid=89666128&tick=0>

2. A screenshot of the cited URL was included in the complaint and is attached as annexure "A". The adjudicator confirmed that the annexure is the same as the website at the URL given in the complaint.

3. The second complaint, designated 4336, read as follows:

Affiliations: I am employed by, or otherwise associated with one of WASPA's member companies

Affiliation_Information: I want to remain anonymous. I am a WASPA member

Name_WASP: Sybase365

OtherID: Celldorado

Code_Breached: Code_Breached: 11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

What this means:

An advert must not appear to offer the customer a single ring-tone, image or other piece of content for free or for a fee, if it is actually an advert for a subscription service.

Detailed_Description_Complaint: A subscription service is being bundled with a specific content item, a mobile game, on this website.

The customer is prompted to select a specific content item to start the subscription. The code clearly states that this is bundling and therefore not allowed.

<http://za.celldorado.com/ZA/ADS/1374431729/index.php?trackid=89666128&tick=0>

4. A screenshot of the cited URL was included in the complaint but proved to be a copy of the screenshot for the first complaint. The adjudicator found the website page at the URL listed in the complaint and attached a copy thereof as annexure "B".
 5. The WASPA Secretariat, as is its standard procedure with competitor complaints, conducted the matter as a formal complaint from the outset.
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Response

6. The SP was of the view that the complaint had no merit and requested that the Secretariat should forward its responses to the Complainant before the matter was referred to formal adjudication, in the hope that it could be resolved informally. The Secretariat did this, but the complainant nonetheless insisted that the matter be formally adjudicated.
7. The SP responded as follows to both complaints:
 - 7.1. The SP referred to the report in complaint number 3106, which involved the same SP and IP, and stated that after it had received the report in that matter the IP had changed its advertisements so as to comply with the requirements set out in the report. As the facts of this complaint were in the SP's view very similar to those in complaint 3106, the SP could not see how the IP could have infringed the Code of Conduct.
 - 7.2. The advert does not deceive anyone as to the nature of the service.
8. In a letter dated 28 May 2008 the IP's legal officer stated the following:

We have received notification of complaints #4335 and #4336, which state:

Clauses breached: 11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

Description of Complaint: A subscription service is being bundled with a specific content item, a realtone, on this website. The customer is prompted to select a specific content item to start the subscription. The code clearly states that this is bundling and therefore not allowed.

In response to these two allegations, Blink (trading the website Celldorado) wishes to reply as follows:

(A) The advertizing clearly states, in visible and clear manner, the fact that the service provided is a subscription. The mention to specific products is done to show the available content within the subscription. It is hard to imagine how to offer a subscription service without mentioning the specific content a customer may obtain from it.

(B) Additionally, and from a legal perspective, version 3.2 of the Code ended its application on 20 April 2006. However, WASPA still refers to it as applicable. The latest version of the code (version 5.7) does not make reference to this point.

(C) Finally, the two complaints are filed by "Anonymous. Affiliations: I am employed by, or otherwise associated with one of WASPA's member companies. Affiliation Information: I want to remain anonymous. I am a WASPA member". This is contrary to the principle of due process, in which any person accused of wrongdoing is entitled to know the identity of the person making such allegation. The lack of identity of the complainant creates a violation of the due process and equal treatment of Blink.

Portion of the Code Considered

9. As the conduct complained of took place in May 2008, version 5.7 of the WASPA code of Conduct applies.
 10. The IP argues that the incorrect version of the Code of Conduct has been cited. This adjudication has been made using version 5.7 as reflected below.
 11. The following portions of the WASPA Code of Conduct are relevant:
 - 2.5.** "Bundling" means automatically subscribing a consumer to a subscription service in response to a request from that consumer for a single content item.
 - 2.23.** A "subscription service" is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.
 - 4.1.2.** Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
 - 11.1.1.** Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".
 - 11.1.2.** Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be bundled with a request for a specific content item.
 - ...
 - 11.1.4.** Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.
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Decision

12. The complaint involves alleged "bundling", which is a practice where the consumer is encouraged to download one item of content and then finds himself subscribed to a subscription service with high weekly or monthly charges.
13. In dealing with the allegation it would be useful to compare this matter with complaint 3106 which the SP referred to in its defence of the IP's conduct:

Applicability of Report in Complaint 3106 and Analysis

14. The report in complaint number 3106 dealt with an allegation of bundling, as in this matter. The IP was found not to have been guilty of bundling in that matter, but was found to have infringed the advertising guidelines in that it had not included the words "subscription service" at the top of the advert. The SP relies upon this

decision in its defence in this matter. However, the advert which was the subject of complaint 3106 can be distinguished from those used in the present complaints.

15. In complaint number 3106 the advert in question was clearly an advertisement for a subscription service in terms of which the subscriber would be sent "wallpapers" three times a week at R 20 per wallpaper. The advert contained clear examples of the wallpapers that would be sent to the subscriber. A free ring tone was included in the subscription offering, but the free offer was clearly secondary to the products being advertised.
16. In this case, the advert has a heading which states "Free Extra Realtone" in the first complaint and "Free Extra Game on your Mobile" in the second. Thus the free offering is the main theme of the advert, not the product being advertised. It is not made clear in the body of the advert what the customer is actually getting the free content WITH. It is for the consumer to deduce from reading the terms and conditions and the "Subscription Service" label at the top right what the nature of the offering really is.
17. The consumer is given a choice of one of five free products (ring tones in the first complaint, games in the second). In order to subscribe, the consumer must select one of the free offerings, fill in his cellphone number, and click on the "get it" button.
18. The difference between the adverts is thus clear: the advert in complaint 3106 was a valid offer to enter into a subscription agreement with the IP, with a secondary free product thrown in as an inducement. In the case of the adverts which are the subjects of these complaints, the main message to the consumer is that free products are available, and the subscription service offer is very much by-the-way.

Bundling

19. Having said the above, the adverts do meet the requirements set out in the Code of Conduct in respect of advertising such services, and the terms and conditions read with the "subscription service" label do make it clear to the careful reader that this is in fact a subscription service.

Misleading

20. Therein lies the rub: it takes careful reading to ascertain that these adverts are for a service where you receive three products per week for your subscription. It is moreover not entirely clear to the adjudicator, after some time spent examining the adverts, what exactly the consumer is getting for his money.
21. In the case of complaint 4335 is it a random selection of song ringtones, or a selection of the songs of the particular artists listed for "free" download?
22. Complaint 4336 is slightly clearer, having a rubric stating: "Select your first game now! Receive many more!", but the five "free" games seem to each be from entirely different game genres: does the subscriber get games from a particular genre, or a mix of genres?

23. The fact remains in any event that the main attraction in these adverts is the free download and not the service itself.
24. In my view these adverts are misleading as contemplated in section 4.1.2 of the Code of Conduct. There is a strong possibility that consumers will think that they can download the free ringtones or games without subscribing to the subscription service.
25. It is very difficult to define where the point lies beyond which advertising can be said to be misleading. I am tempted to quote the old chestnut by Justice Potter Stewart in the US Supreme Court decision of Jacobellis v. Ohio 378 U.S. 184 (1964) where he (in)famously stated when attempting to define hardcore pornography:

 "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [*of pornography*]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it..."
26. These adverts are misleading, and the IP has thus infringed section 4.1.2 of the Code of Conduct in both complaints.

Due Process

27. Finally, the IP argued that its rights to due process have been violated by the fact that the Complainant has remained anonymous. A practice which has developed, and which has now been formalised in version 6.1 of the Code of Conduct, is that the Secretariat will allow the Complainant to remain anonymous if it feels that this would not prejudice the SP/IP's ability to respond to the complaint.
28. The Secretariat decided to allow the Complainant to remain anonymous in these complaints, and it is not for the adjudicator to interfere with such a decision unless anonymity would prejudice the SP/IP. The adjudicator cannot see how this could be so, and as the IP has not given any detail of such prejudice, the adjudicator is not in a position to interfere with the Secretariat's decision.

Sanction

29. The WASPA Code of Conduct has been amended by version 6.1 effective 1 July 2008, and use of the word "free" is from now on to be severely restricted. The decision in this report may thus appear academic. However, it is clear to the adjudicator that the IP is pushing the envelope when it comes to the advertising of subscription services, and in this case has pushed it a little too far.
30. Accordingly the following sanction is imposed in respect of both complaints 4335 and 4336:
 - 30.1. the IP must immediately amend all its advertising for subscription services so that free offers (or offers of "extra" content or similar) do not constitute the only or primary message.

30.2. the IP is issued with a formal reprimand.

31. In the light of the amendment to the code described above, the IP is advised that it will in future in any event not be allowed to use the word "free" in advertising for subscription services, unless the service is itself free.

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Annexure A

SUBSCRIPTION SERVICE – R60.00/WEEK

* FREE EXTRA REALTONE



BACKSTREET BOYS HELPLESS WHEN SHE SMILES	SHAYNE WARD NO U HANG UP	WESTLIFE SOMETHING RIGHT	CHRIS BROWN WITH YOU	TIMBALAND FT, ONE REPUBLIC APOLOGIZE
Select Here <input type="radio"/>	Select Here <input type="radio"/>	Select Here <input type="radio"/>	Select Here <input type="radio"/>	Select Here <input type="radio"/>
Listen Here <input type="radio"/>	Listen Here <input type="radio"/>	Listen Here <input type="radio"/>	Listen Here <input type="radio"/>	Listen Here <input type="radio"/>

1 ENTER YOUR MOBILE NUMBER **2** CLICK ON SEND

Receive one bonus realtone when you join; subscription service, R60 per week.

*Bonus realtone is for free. Bonus realtone will be sent the first week of subscription. This subscription service is available only to MTN and Vodacom users. You will receive 3 realtones per week which will be charged at R 20 per item. Download charges may apply. The shown item(s) form(s) part of the subscription service and is/are indicative of the content items that will be received. To cancel the service, send STOP WHIT4 to [31631](tel:31631). Bill payer's permission required. Min. age 18+ or with permission of parent or guardian. Celldorado operates according to the South African Wireless Application Service Providers' Association Code of Conduct. Celldorado offers innovative information and entertainment for your mobile, such as ringtones, Javagames and wallpapers. Celldorado offers original, unique services with the highest standards. IP: Blink. Helpdesk: 0800 980 963.

[More realtones](#) | [Celldorado](#) | [Compatibles handsets](#) | [General terms and conditions](#) | [Specific terms and conditions](#) | [Privacy policy](#) | [Copyright policy](#) | [Contact](#) | [Mobile Guardian](#)


Annexure B

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SUBSCRIPTION SERVICE – R60.00/WEEK

FREE EXTRA GAME ON YOUR MOBILE

Select your first game now!
Receive many more



Select Here <input checked="" type="radio"/>	Select Here <input type="radio"/>	Select Here <input type="radio"/>	Select Here <input type="radio"/>	Select Here <input type="radio"/>
TOCA RACE DRIVER 3	SENSIBLE SOCCER SKILLZ	CUDDLES THE PANDA	TERMINATOR IS BACK	RUSH HOUR 3

1. ENTER YOUR MOBILE NUMBER **2. CLICK ON SEND**

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Receive one bonus game when you join; subscription service, R60 per week.

*Bonus game is free. Bonus game will be sent the first week of subscription. This subscription service is available for all networks. You will receive 3 games per week which will be charged at R 20 per item. Download charges may apply. The shown item(s) form(s) part of the subscription service and is(are) indicative of the content items that will be received. To cancel the service, send STOP WGAME2 to 31631. Bill payer's permission required. Min. age 18+ or with permission of parent or guardian. Celldorado operates according to the South African Wireless Application Service Providers' Association Code of Conduct. Celldorado offers innovative information and entertainment for your mobile, such as ringtones, Javagames and wallpapers. Celldorado offers original, unique services with the highest standards. IP: Blink. Helpdesk: 0800 980 963.